No. 92-603

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

BEACH COMMUNICATIONS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

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1. In defending the D.C. Circuit's decision finding irrational the definition of "cable system" in the Cable Communications Policy Act of 1984 (Cable Act), 47 U.S.C. 522(6), respondents[1] emphasize that the Federal Communications Commission traditionally relied on use of public rights-of-way as a basis for subjecting cable operators to local franchising requirements. Br. in Opp. 5-12. They suggest that because facilities that serve separately owned build-

[1] We use the term "respondents" to refer to respondents in opposition. We refer to respondent National Cable Television Association, Inc., which filed a brief in support of the petition, as "NCTA."

ings without crossing public rights-of-way would not fall within the FCC's traditional justification for requiring the franchising of cable facilities, the rationality of the Cable Act's regulatory structure is open to question. Br. in Opp. 7-10. For two reasons, however, respondents' argument is beside the point.

First, while it is true that a facility's use of public rights-of-way has been a crucial determinant in allocating responsibility over cable to local governments, see, *e.g.*, *New York State Comm'n on Cable Television* v. *FCC*, 749 F.2d 804, 810-811 (D.C. Cir. 1984), that hardly forecloses other reasons supporting a local franchising requirement. Particularly in light of the generous standard by which this Court evaluates the existence of a rational basis for federal legislation, see, *e.g.*, *Sullivan* v. *Stroop*, 496 U.S. 478, 485 (1990); *United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980), it is extraordinary for respondents to suggest (Br. in Opp. 7-10) that the FCC's pre-Cable Act policy defines the universe of rational reasons for imposing franchise requirements on cable facilities.[2]

[2] Respondents also cite (Br. in Opp. 10-11) passages from the Cable Act's legislative history suggesting that the premise of local jurisdiction over cable facilities is the use of local streets and rights-of-way. However, the court of appeals held, and respondents do not contest in this Court, that the Cable Act in fact applies local franchising requirements to certain facilities that use no public rights-of-way. Pet. App. 19a-25a. The fact that the legislative history does not explicitly state a rationale for such a franchising requirement does not justify invalidation of the statute on rational-basis grounds. See *United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. at 179 (explaining that "this Court has never insisted that a legislative body articulate its reasons for enacting a statute," particularly "where the legislature must necessarily engage in a process of line-drawing"); *Flemming* v. *Nestor*, 363 U.S. 603, 612 (1960) (it is "constitutionally irrelevant" whether the rational reasons for a classification "in fact underlay the legislative decision"); see also *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 115 (1988) ("It is not the law that a statute can have no effects which are not explicitly mentioned in its legislative history.").

Second, the question presented is whether it is rational for Congress to draw a regulatory distinction between facilities that serve commonly, as opposed to separately, owned buildings. It is telling, in that regard, that respondents ignore the fact that the FCC had since its earliest cable regulations embraced a "private cable" exemption for facilities serving commonly owned, controlled, or managed multiple-unit buildings. See Pet. 13 n.10. In addition, the Commission did not apply this "private cable" exemption to private developments with individually owned lots and dwellings, even where a system operated only on private property. See *In re Citizens Development Corp.*, 52 F.C.C.2d 1135, 1137 (1975); see also NCTA Br. 10 n.28 (discussing pre-Cable Act FCC precedents). Thus, contrary to respondents' contention, pre-Cable Act Commission precedent directly supports the disparate regulation of cable facilities that serve separately, rather than commonly, owned buildings.[3]

[3] Respondents err in relying heavily on *In re Earth Satellite Communications, Inc.*, 95 F.C.C.2d 1223 (1983), aff'd *sub nom. New York State Comm'n on Cable Television* v. *FCC*, 749 F.2d 804 (D.C. Cir. 1984). As respondents note, the FCC in that docket preempted state and local regulation of SMATV facilities. 95 F.C.C.2d at 1235. However, the Commission was

2. Respondents take issue (Br. in Opp. 12-18) with the consumer-protection rationale that Chief Judge Mikva offered (Pet. App. 42a-43a), and the Commission endorsed (*id.* at 50a), to support the "common ownership" requirement. Respondents principally contend (Br. in Opp. 13) that the "common ownership" requirement does not constrain the size of a SMATV facility, because a SMATV operator may evade the requirement by placing a separate satellite dish on each separately owned building, rather than running a wire from one dish to the various buildings.[4]

Respondents, however, quickly reveal the flaw in their own reasoning, by noting that Section 522(6) "escalate[s] the cost of serving separately-owned buildings, from the minor cost of a length of interconnecting cable strand to the major cost of [installing] an entire duplicative satellite headend facility" on each of the buildings. Br. in Opp. 13. If that is the case,

careful to emphasize that "SMATV systems serving one or more multiple unit dwellings under common ownership, control or management * * * are the subject of this proceeding," and that "SMATV systems which are defined as cable television systems by this Commission are not under scrutiny here." *Id.* at 1224 n.3. Thus, *Earth Satellite* says nothing about the justifiability of local regulation of cable facilities serving separately owned, controlled, and managed buildings.

[4] As the FCC made clear in its rulemaking in this case, "the use of wire or cable within the confines of a multi-unit building is not sufficient to bring the service within the jurisdictional bounds of a 'cable' system." *In re Definition of a Cable Television System*, 5 F.C.C. Rcd. 7638, 7640 (1990). If a cable company operates a series of such facilities, without interconnecting the buildings by any physical medium, there is nothing to bring that company within the definition of a cable system.

then the coverage of facilities serving separately owned buildings advances precisely the interest that Chief Judge Mikva and the FCC suggested; it makes it more costly for a SMATV operator to serve a large market of separately owned buildings without triggering the franchise requirements of the Cable Act.[5]

In contrast, Congress could reasonably have concluded that such incentives triggering coverage were less warranted for cable facilities serving commonly owned buildings. The "common ownership" require-

[5] Respondents note that "[t]o maintain that Congress acted rationally to attempt to constrain the size of SMATV systems not subject to local regulatory oversight by imposing the financial hardship of such 'multidish' entry, rather than simply legislating that no SMATV operator may serve more than 'x' number of subscribers without a franchise, is itself irrational." Br. in Opp. 14. That contention, however, misses the point of the rational-basis test. Where economic or social legislation is at issue, Congress does not run afoul of equal protection principles merely because a classification "made by its laws [is] imperfect" or "is not made with mathematical nicety." *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970). As this Court has made clear, "[t]he problems of government are practical ones and may justify * * * rough accommodations," *ibid.*, and an Act of Congress may survive rationality review even if it is "to some extent both underinclusive and overinclusive." *Vance* v. *Bradley*, 440 U.S. 93, 108 (1979). Thus, respondents may be entirely correct (Br. in Opp. 29) that Section 522(6) might require the franchising of a facility serving 75 subscribers in separately owned buildings, while exempting a facility serving 1000 subscribers in a single building. But that possibility has no effect on the constitutionality of the Act, which depends on whether it is plausible to think that a facility serving commonly owned buildings is more likely to serve a smaller group of subscribers.

ment is itself apt to place a relative constraint on the size of the market served by a cable facility, because the Act's franchise requirements will be triggered if the facility expands to serve subscribers whose dwellings are not under the same ownership, control, or management. Under this Court's cases, see, *e.g.*, *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955); *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106 (1949), that plausible distinction between facilities serving commonly, as opposed to separately, owned buildings is ample to sustain the rationality of the challenged classification.[6]

[6] Respondents also contend that the consumer protection rationale is undermined because the Cable Act generally exempts facilities using nonphysical transmission media. Br. in Opp. 15-18. They argue that if Congress sought to protect consumers by regulating facilities with a larger subscriber base, "it makes no sense that Congress did not also seek to restrict the market size of locally unregulated 'wireless' operators." Br. in Opp. 16. The court of appeals, however, declined to reach the question whether there is a rational basis for exempting wireless facilities while regulating facilities that interconnect separately owned buildings through physical transmission media. Pet. App. 3a. Respondents' argument is, therefore, a thinly cloaked effort to raise an issue not properly before this Court.

In any case, respondents err in contending that if Congress chooses to regulate some types of facilities with a large subscriber base, it must regulate them all. See, *e.g.*, *Flemming* v. *Nestor*, 363 U.S. at 612 ("it is * * * constitutionally irrelevant * * * that the [statute] does not extend to all to whom the postulated rationale might in logic apply"); *United States* v. *Petrillo*, 332 U.S. 1, 8 (1947) ("it is not within our province to say that, because Congress has prohibited some practices within its power to prohibit, it must prohibit all within its power"). As Chief Judge Mikva suggested, there is a rational basis for

3. Respondents next contend that this case does not merit review because the court of appeals applied the proper standard of review under the rational basis test. Br. in Opp. 21-25. According to respondents, the court was not asking the FCC to create a record to support the statute, but was merely seeking its help in conceiving of facts that might support it. *Id.* at 23.

As we have explained (Pet. 12-13), the court of appeals did not follow this Court's precedents holding that a rational basis need not be reflected in a legislative or administrative record. In its decision remanding the case for the FCC to provide "additional 'legislative facts'" (Pet. App. 36a), the court explicitly stated that "*[o]n the record before us*, we fail to see a 'rational basis'" for the classification. *Id.* at 34a (emphasis added). After the record was returned following the remand, the majority gave no consideration to the substance of the justifications advanced by Chief Judge Mikva and endorsed by the FCC.[7] Rather,

exempting wireless technologies that has nothing to do with the consumer protection rationale; Congress may have been trying to provide a deregulatory incentive to switch to such technologies. Pet. App. 42a. While respondents assert that encouraging facilities to use scarce airwaves is both contrary to federal communications policy and "unwise" (Br. in Opp. 18), it is basic to modern equal protection case law that federal courts have "no power to impose * * * their views of what constitutes wise economic or social policy." *United States R.R. Retirement Board* v. *Fritz*, 449 U.S. at 175.

[7] Respondents assert that the FCC's report on remand was in fact a rejection of the policy underlying the classification, and that the Commission's failure to supplement the justifications proffered by Chief Judge Mikva left the court of appeals "high and dry." Br. in Opp. 23; see *id.* at 19-23. That argument misapprehends the character of rationality review and

the court rejected the reasonable supposition that cable facilities serving separately owned buildings

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the premise of separated powers underlying our government. It is irrelevant whether the FCC was able to add its own set of justifications to those of Chief Judge Mikva; what is pertinent here is that under the rational-basis test a "statutory distinction does not violate the Equal Protection Clause 'if any state of facts reasonably *may be conceived* to justify it.'" *Sullivan* v. *Stroop*, 496 U.S. at 485 (emphasis added) (quoting *Bowen* v. *Gilliard*, 483 U.S. 587, 601 (1987)). Thus, the statute should have been sustained based on the "plausible reasons for Congress' action" (*United States R.R. Retirement Board* v. *Fritz*, 449 U.S. at 179) proffered by Chief Judge Mikva. Contrary to respondents' suggestion (Br. in Opp. 20-21), moreover, it makes no difference whether the classification reflects the Commission's own policy preferences. As the court of appeals (Pet. App. 19a-25a) and Commission (5 F.C.C. Rcd. at 7641-7642) recognized, the Cable Act is clear in covering facilities that interconnect separately owned buildings through physical transmission media. We are aware of no case holding a statute unconstitutional on the ground that an administrative agency has expressed a policy preference different from the one expressed in the plain language of the statute.

In addition, respondents suggest (Br. in Opp. 20-21) that Congress has abandoned the policy at issue, because Congress was made aware of the court of appeals' decision, but did nothing to amend the statute when it later enacted the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460. Inasmuch as the court held Section 522(6) unconstitutional on its face, it is difficult to see what purpose would have been served by Congress's reenacting that provision. Indeed, what is more significant is that Congress did not revise the language of Section 522(6) in light of the court of appeals' decision. If anything, Congress's failure to amend the statute to conform to the court of appeals' constitutional ruling suggests that Congress has *not* acquiesced in the lower court's constitutional holding in this case.

are more likely to resemble traditional cable systems, because it had "no basis for assuming this." *Id.* at 4a. Finally, the court refused even to consider Chief Judge Mikva's other justifications because "the FCC has wholly failed to flesh these out." *Ibid.*

Accordingly, contrary to respondents' argument (Br. in Opp. 25), it is clear that the court was not merely looking for help with its lack of imagination for legislative facts. Rather, it sought to have the agency supply it with an articulated or empirical basis to sustain the classification at issue. Such a pursuit, however, cannot be squared with this Court's cases.

4. Finally, respondents ask (Br. in Opp. 27-30) this Court to deny review because they believe that in light of its impact on First Amendment interests, Section 522(6) would not survive heightened equal protection scrutiny on remand. That contention is without merit. The court below never addressed the merits of a heightened scrutiny equal protection claim, and it expressly reserved the question whether such a claim would even be ripe for consideration. Pet. App. 32a. Thus, petitioners would have this Court deny review of a case striking down an Act of Congress on rational-relation grounds—based on their view of a claim that is not before this Court and whose ripeness was not even addressed below.

Passing on the validity of a statute is "the gravest and most delicate duty that this Court is called on to perform," *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.), and the performance of that duty is all the more critical where an Act of Congress has been held invalid under the appropriately

deferential rational-basis standard of constitutionality. The theoretical possibility of respondents' asserting an alternative ground on remand should not insulate such a decision from further review. Cf. *Leathers* v. *Medlock*, 111 S. Ct. 1438, 1447 (1991) (reversing on writ of certiorari a state supreme court's decision invalidating a state statute on First Amendment grounds, and then remanding the case to the state court to consider an equal protection claim previously left open).

In any case, as we have discussed (Pet. 22), further review is particularly important here because the D.C. Circuit seriously misapplied rationality review, and its docket disproportionately involves complex regulatory statutes. Properly deferential application of rational-basis review—in accord with this Court's decisions—is critical to ensure that the federal judiciary does not substitute its views on wise regulatory policy for those of the people's elected representatives. The importance of the correcting the court of appeals' decision therefore far transcends the judgment in this particular case.

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For the foregoing reasons and those given in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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